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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941—No. ~~980.~~ 30

LAWRASON RIGGS, JR., Special Guardian,
Petitioner,

against

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST COMPANY, as Trustee,
Respondents.

REPLY BRIEF FOR PETITIONER IN ANSWER TO BRIEF FOR RESPONDENTS GIOVANNI DEL DRAGO AND MARCEL DEL DRAGO.

Petitioner takes exception to the implication which respondents' brief would give that the present case is of little moment.

(1) It is suggested by respondents that Mrs. Del Drago's will was "only the draftsman's blunder". The minority opinion of the Court of Appeals pointed out (287 N. Y. 61, 86, 38 N. E. 2d 131, 143):

> "* * * The will here, carefully drawn and disposing of a large estate, was made in 1934, four years after section 124 went into effect. Testatrix and her advisers are presumed to have known and must have known that, by the terms of section 124, she could

by inserting a few words in her will, forbid apportionment of the estate taxes and command their payment from the residue. She chose not to do so. * * *"

Nor is experience in accord with respondents' statement. Petitioner's main brief points out (pp. 7, 8) that thousands of similar wills have been made in the last eleven years in reliance on section 124 of the New York Decedent Estate Law; that hundreds of pending estates are seriously affected by this decision; and that there are many wills of living persons drawn in the light of this section which cannot or will not be redrawn.

(2) Reference by respondents (p. 4) is made to two proposals now before the present Congress either of which it is asserted would render academic the issue here.

As a matter of fact, these proposals show or tend to show how seriously the decision of the Court of Appeals is regarded and that there is immediate need to remedy the situation by judicial or in the alternative by legislative action.

Moreover neither proposal for future legislation if enacted would remedy the situation in this estate or in the hundreds of others now in the process of administration in New York and Pennsylvania where the legislatures have acted or in other jurisdictions where the right to act has been asserted by judicial decision. Nor would these proposals render academic the fundamental question in this case of whether a State's judiciary in the absence of legislation or a State Legislature has not the full right and power to deal with the incidence of the federal estate tax after the tax "has been" paid.

It is not the purpose of this brief to answer respondents' various arguments as to the correct interpretation of the

Federal Estate Tax Law or the constitutional questions arising therefrom. The basic fallacy of their argument as to the interpretation of the Federal statute, however, may be briefly pointed out. Throughout their brief their position is that the federal estate tax is a tax imposed upon the estate and not upon any legacy and that for this reason it follows that the incidence of the tax falls upon the estate and not upon the beneficiaries (pp. 1, 3, 5). But the burden of the tax must, as Judge Hough pointed out (*Edwards* v. *Slocum*, 287 Fed. 651, 653 (C. C. A. 2d) aff'd 264 U. S. 61) fall on some beneficiary. It is therefore no answer to the question in this case to say that Congress intended the incidence to be upon the estate and not upon the beneficiaries. The question in the present case is whether Congress intended in this respect to provide as between beneficiaries which beneficiaries should bear the burden of this tax after it has been paid in full to the Federal Government to the exclusion of action by the states.

It is no answer to say as respondents do that Judge Hough fell into error because "a considerable mass" of so-called "proof" was not called to his attention. That is not the point, as counsel must realize. The fact of significance is that counsel for the Government, in their briefs in the United States Supreme Court, accepted and stood squarely on Judge Hough's decision, that Mr. Justice Holmes and Chief Justice Taft in their opinions recognized that fact, and that after this Court in that case had decided against the Government, the Congress enacted this very position as part and parcel of the Federal Estate Tax Law (section 812(d), Internal Revenue Code; see petitioner's brief, pp. 9, 10).

An effort is made by respondents, from Statement to Conclusion (pp. 1, 22) to confine the attention of this Court to a single section, section 826(b) of the Internal Revenue

Code and then to argue that by reason of that section, petitioner has failed to disprove repugnancy. It would seem to be obvious that where a claim of direct repugnancy is asserted by respondents between a remedial State statute and a Federal statute, one is called on to consider the Federal Act in its entirety and scarcely can rely on one of its incidental sections.

In any event respondents have failed to meet the proposition that Congress having expressly left it to testators to determine by will the final incidence of the Federal estate tax by necessary implication has left unimpaired the authority of the States to determine the final incidence of the tax after payment through the power of the States to control the will-making privilege. There is therefore no conflict between the Federal Estate Tax Law and section 124 of the New York Decedent Estate Law.

In *Irving Trust Co. v. Day*, 314 U. S. ....., this Court has taken occasion to reaffirm the fundamental proposition that the power of testamentary disposition is within the states' control and that the exercise of testamentary privilege with a statutory condition attached will impose the consequences of that condition and thus effect the estate disposed of by the will so interpreted. As was there said:

> "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."

Conclusion.

The issue in this case has not arisen, as asserted by respondents (p. 22), "in narrow and unusual circumstances". It is a live question in all States and is now pending by virtue of legislation in both New York and Pennsylvania.

The four to three vote by the Court of Appeals is in direct conflict with the determination of the New York State legislature based upon fact finding reports of two New York State Commissions and is also in conflict with like legislation in Pennsylvania. The importance of the situation could hardly be over-stated, as is partly indicated by the very bills in Congress which respondents have brought to the Court's attention.

Respectfully submitted,

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Dated: New York, N. Y., March 23, 1942.